

UNITED STATES DISTRICT COURT

District of Massachusetts
1 courthouse way, suite 2300
Boston, Massachusetts. 02210
617-748-9152

**FILED
IN CLERKS OFFICE**

2006 MAR 23 P 12: 55

**U.S. DISTRICT COURT
DISTRICT OF MASS.**

**Rashid Jahm
Pro se
Plaintiff**

**Case No:05CV11638-JLT
Jury Trial Demanded**

Vs

**Paul J. Fischer
Juliana deHaan Rice
Assistant Attorney General
One Ashburton Place –Room 2019
Boston, MA. 02108
(617) 727-2200, ext. 2062**

**Mark E. Donnelly
Pro Hac Vice
Attorney for defendant
State of Michigan
P. O. Box 30736
Lansing, MI. 48909
(517) 373-6434**

Plaintiff answer to Motion of defendant's state of Michigan and Paul J. Fischer

Plaintiff brought this case in the federal court because of his violation of constitutional right and violation of due process

Plaintiff answer to defendant eleventh amendment immunity

1: Commence and prosecuted against one of the United State by Citizen of another State Supreme court amended and passed in ruling of Chrisholm V. Georgia, 2 U. S. 419 (1993) that federal court have the authority to hear cases in law and equity against state, and that did not enjoy sovereign immunity from suits made by citizen of other States. Because Plaintiff have brought under Diversity Jurisdiction of the federal court suits against state so Eleven Amendment will not apply here.

The 14th Amendment isn't a cause of action; the cause of action is found in 1983, which is a statute allowing you to sue for violation of constitutional rights, including those applied to the states through the Due Process clause of the 14th Amendment.

When a judge (Dennis Leiber) decided a case, which was a state action. He did not do it with compliance with law so due process requirement was not met. So clearly it was a 14th Amendment violation. He simply expanded his own power outside of the law. Simply again, this was unconstitutional.

Federal Jurisdiction

Plaintiff complaint of filling suits in federal court have risen in two instances by defendants violation of plaintiff constitutional right and due process which come under federal jurisdiction

1: Defendants violated plaintiff constitutional right and violated due process.

2: plaintiff claim has involved by defendant in diversity of citizenship (citizens of different state) and plaintiff suits amount is more than \$75000. Under statute 28 U.S.C. § 1331. The district courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

United state district court has subject matter jurisdiction to hear this plaintiff case because the parties are diverse, meaning that defendant come from different states.

3: Plaintiff has brought these suits against defendants of defendant's action that was brought under jurisdiction of subject matter that is why it is not necessary if it have personal jurisdiction

Dennis Leiber said Police officer did not have X rays vision. Contradiction to testimony of police car. .Exhibit (A) Page 13 to page 18.

Congress has conferred upon federal courts jurisdiction to decide *federal questions* i.e., cases or controversies arising under the Constitution and laws of the United States 28 U. S. C. § 1331 and cases or controversies between citizens of different states (*diversity jurisdiction*). 28 U. S. C. § 1332. Plaintiff is certain Venue is proper.

Exclusive jurisdiction only federal courts have authority to hear a case.

Plaintiff has requested relief in his complaint. Plaintiff alleges that defendants is liable in both his official

and individual capacities under 42 U.S.C. § 1983 (1994) Motion before Hon. Judge Donald A. Johnston Exhibit (B) page 3 to 66

Articles 111, 2 of the united State Constitution give the US congress the power to permit federal court to hear such cases. Where Plaintiff has been unable to get justice and all defendants conspire to deceive, violated his constitutional right and violated his due process.

All defendants have been failing to answer plaintiff's documented proof. Instead trying to cover up their fraud by finding way without answering to allegations. Plaintiff is requesting for discovery.

Wherefore Plaintiff request to Hon. Court for all defendants to compel answer have truthfully with affidavit or simply admit the allegations instead finding way out. This court has jurisdiction on all defendants.

Dated: March 21, 2006

Rashid Jahm

Pro se

49 Hallen Ave
Lawrence, MA 01841
978-258-9419

CC:

Document mailed by us postal to all

Patrick Dolan

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Mark E. Donnelly (P39281) Pro Hac Vice

Robert P. Powers,

Thomas R. Meagher

Judy E. Bregman

CERTIFICATE OF SERVICE

Dear Clerk

I hereby certify that a true copy of the foregoing document was served on all know parties herein by causing a copy of the same to be mailed, postage prepaid on March 21, 06.

Respectfully,

Dated: 03-21-06

Rashid Jahm

49 Hallen Ave

Lawrence, MA.01841

978-258-9419

1 lanes are there? Let's take tl hat would be the east
2 part of that intersection?
3 A The east part of it?
4 Q Yes. How many lanes?
5 A There's five lanes.
6 Q And, when you say there are five lanes -- I only see four.
7 One, two, three --
8 A I'm talking about on Three Mile. Are you talking about on
9 Alpine?
10 Q Yeah. We'll get to that. How many lanes?
11 A Southbound on Alpine there's three lanes, one's a
12 right-turn lane -- not three lanes. There's three
13 southbound lanes. One is a right-turn lane. There's two
14 lanes going southbound, and then there's a left-turn lane,
15 also.
16 Q And in which lane was Mr. Jahm when you struck -- when your
17 car struck his car?
18 A He wasn't in any of the lanes. He was in the intersection.
19 Q That's correct. He was in the intersection, wasn't he?
20 A That's right.
21 Q And you didn't have any obstacle whatsoever that prevented
22 you from seeing his car in the intersection?
23 A Yes, I did.
24 Q Would you tell the jury what was in the intersection, in
25 the intersection, that prevented you --

1 A The two vehicles.

2 Q Listen to my question please, sir. That prevented you --
3 you said you were stopped. That prevented you from seeing
4 the car approach?

5 A The two vehicles that were southbound that I was stopped in
6 front of.

7 Q Look at the chart. Here. Not in the intersection.

8 A They were at the stoplight at the intersection.

9 Q That's at the stoplight at the intersection but, as your
10 testimony just indicated, they were not in the
11 intersection, is that correct?

12 A That's correct.

13 Q And so had you done what I'm going to do now, just look
14 like that (indicating), there was nothing to prevent you
15 from seeing Rashid Jahm's car coming with the green light
16 traveling from the north to the south?

17 A I didn't look like that.

18 Q You did not look, did you?

19 A I did look.

20 Q Now, wait a minute. You didn't look like that, but you
21 looked?

22 A That is correct.

23 Q But isn't it true -- and I'll repeat the question again.
24 Just looking at the chart -- that when you started up in
25 the intersection there was nothing that blocked you

personally seeing his car, Rashid's car, coming from the north and going south?

A Just those two vehicles that were parked there.

Q And they weren't in the intersection as you can see here, am I correct?

A That is correct.

Q So, if those cars were not in the intersection and you looked to the left, would you tell the jury the reason you didn't see Mr. Jahm's car?

A I don't know why I didn't see his car. I saw the motorcycle, and I looked to the left at the time that motorcycle was going up there, and I looked back to the right, and both ways were clear. I accelerated.

Q When you accelerated, you put your foot on the throttle to get going, right?

A Right. I started up, yes, sir.

Q You did not stop at all once you struck Mr. Jahm's car?

A No. I only moved about five feet.

Q You moved five feet -- I'd like to show you what is part of collective Exhibit 4. You moved five feet, and you smashed in the driver's side -- excuse me, the passenger side of Mr. Jahm's car?

A That's the damage my car did, yes.

Q As a matter of fact --
(brief pause)

1 Q As a matter of fact, your car had a smashed in -- that's my
2 term. And what is that called? I'm showing you another
3 picture, Exhibit 4. What is that?

4 A Those are the push bumpers, and they were bent over in the
5 direction that Mr. Jahm was going.

6 Q And a push bumper is made of high strength, tensile steel,
7 isn't that correct?

8 A I don't know what it's made out of, sir. It's made of
9 rubber and steel.

10 Q Tell the jury what a push bumper is used for.

11 A It's used to push vehicles off to the side of road so it
12 doesn't cause damage to the police car or the vehicle
13 you're pushing.

14 Q And this push bumper was smashed in, wasn't it?

15 A It was bent over, yes, sir.

16 Q It was bent over based on your striking the passenger side
17 of Mr. Jahm's car?

18 A As he went by the front of my car, yes.

19 Q When you said, as he went by the front of your car, you
20 smacked him and didn't put the brakes on, did you?

21 A I was starting up, and he sideswiped the front of me and we
22 collided.

23 Q Would you answer my question? You didn't put the brakes
24 on, did you?

25 A No, I didn't.

1 Q Is there some reason you didn't e brakes on if you
2 went five feet?

3 A There was not enough time to put them on.

4 Q Not enough time for you to avoid the accident, correct?

5 A Yes.

6 Q You heard Mr. Jahm's testimony, didn't you?

7 A Yes, I did.

8 Q And he testified -- and these are my words -- that you
9 struck him and then struck him again. Do you remember that
10 testimony?

11 A Yes.

12 Q Isn't it true that you kept going as his car was going --
13 I'll ask you if you know how fast he was going, but he
14 testified 40 to 45 miles an hour. You struck his car and
15 you kept going, didn't you?

16 A No, I didn't.

17 Q When did you stop?

18 A As soon as I struck his vehicle.

19 Q Well, your testimony is that one striking of the vehicle
20 did all that damage?

21 A That's correct.

22 Q And is there some reason that you didn't stop until after
23 you struck the vehicle -- his vehicle?

24 A Well, I didn't put the brakes on.

25 Q You didn't put the breaks on until you struck --

1 A I didn't put them on.
2 Q You never put them on?
3 A After we struck, yes.
4 Q Let's get this clear. Please tell the jury, did you put
5 the brakes on at any time?
6 A No.
7 Q Now, I'd like to show you another part of collective
8 Exhibit 4. Do you see that piece of metal that's lying
9 there?
10 A Yes, I do.
11 Q Will you tell the jury what that is? Do you know?
12 A I believe it's part of Mr. Jahm's car.
13 Q And do you know how it got there --
14 A No, I don't.
15 Q -- in that location?
16 A No, I don't.
17 Q Am I correct that that piece of metal was not moved when
18 the picture -- or prior to the pictures being taken by the
19 police?
20 A No, you're not correct.
21 Q Who moved it?
22 A We don't know. It could have been moved by vehicles
23 passing over the top of it. That picture was taken at
24 least ten minutes after the impact.
25 Q And did you see any vehicle passing over the top of that?

S T A T E O F M I C H I G A N
THE 17TH CIRCUIT COURT FOR THE COUNTY OF KENT

RASHID A. JAHM,

Plaintiff,

vs

No. 00-08794-NI

CITY OF WALKER, a Michigan Municipal
Corporation and EUGENE E. KARS,

Defendants.

COPY

MOTIONS

BEFORE HONORABLE DONALD A. JOHNSTON, CIRCUIT JUDGE

Grand Rapids, Michigan - Friday, July 26, 2002

APPEARANCES:

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RECORDED and
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1 Grand Rapids, Michigan

2 Friday, July 26, 2002 at 3:02 p.m.

3 ~~~~~

4 THE COURT: Good afternoon, everybody. We are
5 convened in *Jahm* -- that's JAHM -- versus *City of Walker and*
6 *Eugene E. Kars*, file 00-08794-NI. Trial is currently
7 scheduled for August 19th. And there are some motions in
8 limine, as near as I can tell, principally pertaining to
9 proposed video tapes and photographs relative to, I think, a
10 squad car showing lights or something and causing a certain
11 amount of angst. And there may be some other issues, too,
12 but that seems to be the principal one.

13 Gentlemen, I'm at your disposal.

14 MR. NOLAND: Your Honor --

15 THE COURT: Mr. Noland.

16 MR NOLAND: -- Your Honor, the motion in limine that
17 was originally scheduled for hearing today was defendant's
18 motion in limine that was filed on June 13, 2002. I don't
19 know if that motion caught your attention.

20 THE COURT: Well, I don't know if it did or not. I
21 mean, one of the problems is that, when we get six
22 succeeding motions, some of them wind up in the file and
23 some of them wind up on my desk. And most of the smoke that
24 I see here is with videos and photographs. I've got all
25 kinds of stuff on that.

1 There's also some collateral reference about lost
2 wages that I didn't completely understand. And then there
3 was something else about the practice of emergency calls or
4 something, and I didn't completely understand that, either.
5 But certainly, I'm in a position to entertain whatever it is
6 that anybody wants to bring up at this point.

7 MR NOLAND: All right. Your Honor, on June 13 --
8 I represent defendants Eugene Kars and the City of Walker --
9 we filed --

10 THE COURT: I've noticed that before.

11 MR NOLAND: -- I have filed a motion in limine
12 with a brief on June 13th, and it has to do with some
13 related subject matter. But specifically, a motion in
14 limine asking this Court not to allow plaintiff to present a
15 claim or suggest a claim or argument that the emergency call
16 procedure of the City of Walker was improper or deficient or
17 provide criticisms about it.

18 THE COURT: Yeah. That was one of the points I
19 see referenced here. Now, what's the problem with that?

20 MR NOLAND: Well, the problem with that, Your
21 Honor, and it gets to some other elements of the motion in
22 limine --

23 THE COURT: I mean, is there something wrong with
24 the procedure or isn't there? And, if there's an argument
25 about it, why don't we just litigate it?

1 MR NOLAND: Well, Your Honor, because there's a
2 governmental immunity in Michigan. And the only claim that
3 survived governmental immunity to the City of Walker is
4 negligent operation of a motor vehicle. And that -- that
5 exception has been construed very narrowly by the Michigan
6 Supreme Court and as other exceptions to governmental
7 immunity are construed very narrowly.

8 That it is our position that, to allow the case to
9 proceed with putting the City of Walker's emergency
10 procedures on trial, is obviously a back door -- it will
11 have the effect of a back door claim of negligence against
12 the city or a tort claim against the city.

13 And the best example I could give of that argument
14 is an analogy to the recent Michigan Supreme Court decision
15 in *Robinson* versus *City of Detroit* where, again, that case
16 generally arose from -- well, actually it's some
17 consolidated cases -- but they were motor vehicle cases.
18 They happened to deal with fleeing felons and the court
19 wrestled with a bunch of issues.

20 THE COURT: That's been a hot issue for 20 years
21 or more.

22 MR NOLAND: Right. But one of the -- one of the
23 points addressed by the majority of the court was: is the
24 decision to initiate pursuit or not fall within the scope of
25 the, quote/unquote, "negligent operation" exception to

1 operation of a motor vehicle.

2 And I thought the only -- and I will point out
3 that there is no specific claim or contention or pleading
4 that says that the city was, quote/unquote, "negligent" in
5 its formulation or implementation.

6 THE COURT: Well, presumably because it's covered
7 by immunity.

8 MR NOLAND: Yes. But my point is obviously it
9 could not be pled to begin with, but why an order in limine
10 is necessary is, if I do not ask the Court to take account
11 of that limited immunity in terms of arguments presented to
12 the jury in proofs, then we have really run the problem of
13 back dooring some claim of negligence because they'll come
14 in and say, "Well, geez, as their expert has claimed, you
15 know, their policy is no good. It doesn't give guidance.
16 It's not worth the paper it's written on."

17 And, you know, if we get into a trial situation
18 and I now have to bring up witnesses that say, "No, you
19 know, this is the same policy used by this city or that
20 city. There's public policy reasons for it."

21 If we get into issues of that nature, well, that
22 might be interesting and maybe it's a good point of public
23 policy debate, but it does not and, I think, should not be
24 part of a case where we are talking about a limited
25 exception to governmental immunity; that is negligent

1 these circumstances truly back doors a claim of negligence.
2 And whether we like it or not, that is a -- that -- and
3 whether we call it a negligent claim or not, in effect, what
4 we're doing is lumping on the city. We are asserting a
5 theory that is within the realm of tort.

6 THE COURT: Well, I understand what you're saying.
7 But all I'm saying is that I means, I presume, the city will
8 not attempt to defend the action by saying that the officer
9 acted according to procedures.

10 MR NOLAND: I think the city will defend the
11 action by saying that he complied with the motor vehicle
12 code provisions that are applicable to emergency responses.

13 THE COURT: Ok.

14 MR NOLAND: The -- the --

15 THE COURT: In other words, the procedure just
16 won't come up at all?

17 MR NOLAND: That's -- that's what I believe is the
18 case. And -- and related to that, and this segues into the
19 second -- it's not an independent argument but I think it
20 applies what we just discussed in perhaps a little more of
21 an evidentiary context.

22 Plaintiff has retained a gentleman by the name of
23 Dennis Payne who has background and experience working for
24 various police agencies. He's not -- and I believe the
25 record is very clear -- he's not undertaken an investigation

1 MR NOLAND: Well, Judge --

2 THE COURT: That's the standard. I mean, that's
3 the --

4 MR NOLAND: -- and the request for admissions --
5 they filed request for admissions -- isn't it -- don't you
6 need to do this or that, you know, keep the safety of the
7 community in mind and large? That's fine.

8 THE COURT: But they do. I mean, I --

9 MR NOLAND: But --

10 THE COURT: -- guess I -- that seems to be quite
11 unremarkable to me. I'm having a hard time comprehending
12 why that's a problem.

13 MR NOLAND: -- and I -- I'll try to connect the
14 dot here. My point, Your Honor, is that whatever the
15 standard of care or duty is is well expressed in the
16 statute. And the statute talks about an emergency vehicle
17 may proceed through a red light. If they proceed, they slow
18 down and exercise the due care. And all I'm asking is, if
19 we're going to have the jury consider this case, let's stick
20 precisely to the requirements of the statute, the motor
21 vehicle code.

22 Because there is some different phraseology and
23 wording. And again, the way this --

24 THE COURT: Well, what words do you want to use?
25 You don't want to use "care." You want to use?

1 MR NOLAND: I want to use the statute.

2 THE COURT: What -- give me the words.

3 MR NOLAND: All right.

4 THE COURT: And what -- and those are -- I mean,
5 is there something that's different about the statute than
6 the standard?

7 MR NOLAND: Yeah.

8 THE COURT: I guess that's -- I'm having a hard
9 time because it seems to me they've got to exercise due
10 care. And I would --

11 MR NOLAND: Well --

12 THE COURT: -- if that's the policy, that's the
13 policy.

14 MR NOLAND: -- sure. And the courts can instruct
15 the jury that both parties have to exercise ordinary care.

16 THE COURT: Exactly. So, I mean, I guess this
17 seems to me to be a tempest in a teapot.

18 MR NOLAND: Well, Your Honor, I --

19 THE COURT: I guess I don't get the problem.

20 MR NOLAND: -- I had illustrated our motion with
21 briefs -- with the brief -- and it showed specific context.
22 And I don't want to --

23 THE COURT: Okay. I've got it here. It's very
24 deep in the file. It's about eight briefs ago. That's the
25 problem.

1 MR NOLAND: Judge, I feel very --

2 THE COURT: And I guess there may be a difference
3 there, although --

4 MR NOLAND: -- I guess, Your Honor, I'd feel
5 comfortable -- and one reason we bring these motions in
6 limine is that maybe I'm being -- flyspecking an issue and
7 maybe it's not important. But I'd rather bring it to the
8 Court's attention and have it there --

9 THE COURT: Well, I think it's a good idea. If
10 we're going to not use the procedure per se, we probably
11 ought to sort that out now. I agree with you. I think that
12 makes sense.

13 MR NOLAND: The other two aspects of the motion in
14 limine -- one is minor -- was that I don't believe the jury
15 -- well, the most important part of it is is that this
16 expert that they retained, this Dennis Payne, the only
17 testimony that he provided had to do with the policy and
18 procedures and why he thought they were not appropriate. He
19 did not offer anything relative to this case in terms of
20 accident reconstruction or things of that nature.

21 And I truly believe, Your Honor, if you happen to
22 agree with my positions on the idea that you cannot -- we're
23 not putting on trial the City of Walker's procedures, then
24 there's really nothing left of Mr. Payne in terms of what
25 he's going to offer the jury.

1 And I think that -- one kind of follows the other.
2 And that's -- that's the point I'm trying to make.

3 THE COURT: Okay. Well, all right. Let's see
4 what Mr. Bransdorfer has to say about this. Mr.
5 Bransdorfer, any reason why we shouldn't use the statute
6 here and go with the language which seems to be virtually
7 identical in any case.

8 MR. BRANSDORFER: Your Honor, the answer to your
9 question is we are not trying, nor is Dr. Payne, in any way
10 trying to change the wording of the statute as being the
11 standard of care.

12 THE COURT: Well then, I guess we're probably in
13 pretty good shape here.

14 MR. BRANSDORFER: But, if you read -- and this is
15 why I think it's important -- if you read, Your Honor, the
16 motion in limine as to Dr. Payne, there were four different
17 aspects of that motion. And, in summary, they wanted barred
18 from in any way reference to the City of Walker's call for
19 service procedure.

20 Well, it doesn't use any language, so far as I can
21 tell, but the statutory language.

22 THE COURT: Well, it's not exactly the same,
23 although it looks to me to be pretty close.

24 MR. BRANSDORFER: And the second thing is what --
25 what they refer to as suggesting a more stringent duty or

1 standard of care. And that is not what plaintiffs intend by
2 any means to do, and that is not what Dr. Payne testified in
3 his deposition or in the exhibits that he prepared that were
4 attached to his deposition.

5 And then there's another aspect of this that
6 apparently has been withdrawn by counsel because he didn't
7 mention it. And that is that the emergency alarm that was
8 being responded to by Officer Kars when he struck the
9 plaintiff's car in the intersection, was, in fact, a false
10 alarm. And --

11 MR NOLAND: I'm not withdrawing that. I don't
12 think that's relevant one way or the other.

13 THE COURT: I guess I'm not sure that it is
14 either, unless Officer Kars knows it's a false alarm, in
15 which case presumably his response to it would be different
16 than if he assumes it's legitimate.

17 MR. BRANSDORFER: That is the point. He's had a
18 number of --

19 THE COURT: In other words, he knows this is a
20 false alarm?

21 MR. BRANSDORFER: No, no. I'm not saying he did.
22 I'm saying that the testimony indicates that there had been
23 a number of false alarms that he has responded to to this
24 very location, the Keller Ford location.

25 And his testimony is he couldn't remember how

1 And what we're saying, Your Honor, is that this is
2 just part of this factual picture. It's not a separate
3 cause of action. These jurors are not police. They need
4 someone that is qualified and he is immensity qualified to
5 discuss police procedures. The testimony that he would give
6 are as to police procedures that we're talking about; what's
7 known; what, in terms of at the scene, due care in terms of
8 the context of the facts. That's admissible. It's
9 relevant.

10 And, as I mentioned in our brief, the Supreme
11 Court has said, in **People** versus **Miller** -- this is, Your
12 Honor, located at 33 Michigan App 279. It's a 1971 case. --
13 and it -- the court said, in terms of an argument similar to
14 what has been made by counsel, that the following is the
15 holding:

16 "An expert witness with peculiar knowledge
17 and special experience which ordinary jurymen do
18 not have, may testify as to opinions and
19 conclusions," citing the AG case, "The conclusion
20 of an expert witness is properly received into
21 evidence when the conclusion to be drawn from the
22 facts depends on professional or scientific skill
23 or knowledge."

24 And the statute uses the term "negligence" and
25 "gross negligence," but it refers to, among other

1 emergency vehicle? Yeah. A police car. A police officer.

2 Is he responding to an emergency call? I think
3 so, although I guess it's open to question here.

4 And then, the next thing we go on to subsection
5 three:

6 "The driver of an authorized emergency
7 vehicle may do the following --"

8 and sub B is:

9 "proceed past a red or stop signal or stop
10 sign, but only after slowing down as may be
11 necessary for safe operation."

12 So, if we assume this is a police vehicle operated
13 by a police officer and if we assume he's on an emergency
14 call, then the only question is did he slow down or do
15 what's necessary for safe operation before proceeding past
16 the red stop signal or stop light.

17 And that, I think, is the whole case, isn't it
18 probably? I mean, aren't we all right in that little
19 paragraph of 603, sub 3, sub B?

20 MR. BRANSDORFER: Your Honor, yes. And we have
21 cited -- there are other related statutes. But -- but
22 here's what the Robinson case said -- it's at page 10 of our
23 brief, and that was a chase case --

24 THE COURT: Right. I understand that that was a
25 chase case and this is an emergency call case not involving

1 an emergency vehicle with flashing lights,
2 specifically states that the statute does not
3 relieve the driver of an authorized emergency
4 vehicle from the duty to drive with due regard for
5 the safety of persons using the highway."

6 In short, Your Honor, we don't think that the
7 motion in limine is well grounded at all; that Dr. Payne
8 should be permitted to testify from his standpoint as to
9 these procedures; what the proper procedure was. He is not
10 an accident reconstruction person but he certainly has been
11 at the scene. He's fully familiar with the facts and has
12 read the provisions that are in the Walker Police Department
13 files.

14 And we think that the jury requires the assistance
15 of an expert in police procedures, and that Dr. Payne
16 should accordingly be permitted to testify as to those
17 relevant issues. And we would request respectfully that the
18 motion in limine as to this matter be denied.

19 THE COURT: All right. Well, Mr. Noland,
20 anything else you want to say about Dr. Payne?

21 MR NOLAND: Yes. I believe a lot of what Mr.
22 Bransdorfer says actually supports our motion; that he
23 recited some of the testimony concerning the percentage of
24 alarms that are false. And, I take it, from his comments,
25 he wants to now have Mr. Payne serve as an expert.

1 And I asked myself what's an expert going to
2 opinionate about, and --

3 THE COURT: I don't know. I assume you guys
4 figured that out during discovery.

5 MR NOLAND: -- well, and the only thing that he's
6 opinionating about is that the procedure is deficient.

7 And the only thing logically that he would offer,
8 as far as expert opinion, is a criticism that, "Somehow,
9 well, you're getting too many false alarms. That's not the
10 way to operate."

11 And then I get back to my point, "Hey, there may
12 be room for honest debate and public policies as to whether
13 or not the procedure is too liberal in terms of, you know,
14 we respond to these things in emergency fashion. But that
15 -- but to have Mr. Payne talk about those statistics and
16 only -- and will only be done in the context of being
17 critical of the formulation and implementation of that
18 policy.

19 So I think that there is nothing that he's going
20 to offer that would do -- that would apply, other than a
21 criticism of the policy and procedure. And that's -- that's
22 what he will opinionate about and, if he's an expert and if,
23 for some reason, we need an expert as Mr. Bransdorfer says,
24 that's what his expert opinion is going to be. And that's
25 why we think it's not proper to allow him in to testify

1 down as may be necessary for safe operation."

2 Unquote.

3 And that's really what we're talking about here.

4 The City of Walker apparently has a procedure for
5 responding to calls which seems to be pretty much consistent
6 with the statute, indicating that the officer must keep the
7 safety of the community at large in mind, which I think is
8 tantamount to the language, "but only after slowing down as
9 may be necessary for safe operation."

10 And I suppose there may be some subtlety of
11 distinction in the language but, although different words
12 are used, it seems to me the same import is generated.

13 I would agree that, because of municipal immunity,
14 the policy of the City of Walker is not the issue here. It
15 is the operation of the vehicle by Officer Kars at the time
16 he received the emergency call.

17 Now, if Dr. Payne can offer us opinion testimony
18 concerning whether what Officer Kars did at the scene was
19 consistent with the statute, then I think probably we can
20 hear from him. If he can offer us some insights about
21 whether Officer Kars slowed down as was necessary for safe
22 operation or not, then he ought to be able to tell us about
23 it.

24 I don't think Dr. Payne criticism's of the Walker
25 policy is pertinent to anything because the policy itself is

1 whether Officer Kars slowed down as was necessary for safe
2 operation in running the red light on the date that the
3 accident occurred.

4 Beyond that, I'm not sure there's a whole lot we
5 can do with it.

6 MR NOLAND: Your Honor --

7 THE COURT: Okay. What else have we got?

8 MR NOLAND: -- the other motion in limine, I
9 think, is not very significant in the sense that it was a
10 motion because plaintiffs has pled a claim of lost wages,
11 and specifically pled a loss of earning capacity. They've
12 obtained --

13 THE COURT: I think that's been clarified in the
14 submissions that I read --

15 MR NOLAND: Right. It looks as if --

16 THE COURT: It looks like we're -- if -- and we'll
17 let Mr. Bransdorfer speak for himself -- but I think he's
18 saying that lost earning capacity is not an issue but wage
19 loss is.

20 MR. BRANSDORFER: That is correct, Your Honor.

21 THE COURT: Okay. I thought that was what you
22 said but I'm glad that I didn't mischaracterize it.

23 MR NOLAND: Yeah. And part of what inspired the
24 motion is that we had some report from Marvin Devries that
25 had different scenarios, one scenario being the possibility

1 consulted with a number of doctors, just as doctors that
2 have been called -- or have been named by the defendants
3 have consulted with other doctors. So --

4 THE COURT: I think that's a good way to go, and
5 we'll just kind of play it by ear. And I'm prepared to go
6 in different directions as the circumstances seem to
7 warrant. And I said the options that come to mind are
8 basically these: we don't allow anybody else to be added; or
9 we do allow somebody to be added; or we do allow somebody to
10 be added and we continue the case in order to prepare for
11 some new contingency. There may be some other
12 possibilities, but I'm willing to consider those three as
13 openers.

14 Well, what else have we to talk about, gentlemen?
15 There's some other issues we need to talk about today?

16 MR. BRANSDORFER: Yes.

17 THE COURT: Mr. Bransdorfer?

18 MR. BRANSDORFER: May it please the Court, we
19 filed a motion in limine, and this goes back to what the
20 Court was referring to --

21 THE COURT: This is this business about
22 photographs and videos and things?

23 MR. BRANSDORFER: Yes.

24 THE COURT: Okay.

25 MR. BRANSDORFER: That's -- that's what --

1 THE COURT: Now, they want to put in some videos
2 of the squad car with the lights on or something like that?

3 MR. BRANSDORFER: Lights on and siren blowing, and
4 it looks like the police car -- at least to me. It's a very
5 short video. -- is in some parking lot. And it's certainly
6 not in the intersection.

7 THE COURT: They probably didn't run around town
8 with it in order to avoid creating another incident.

9 MR. BRANSDORFER: Well, the problem is, in my
10 judgment, is to mislead the -- the jury because the -- the
11 video of the police car is taken with the police car quite a
12 ways in the distance and then somebody apparently walking up
13 with a video camera and the audio on.

14 And obviously, the closer you get the more obvious
15 should be the siren, as well as the search light or the --
16 the lights. And it just seemed to me that there isn't a
17 foundation that can be laid that this is a fair and accurate
18 representation of -- now, I'm talking about that video of
19 the car, the police car -- a fair and accurate
20 representation of what took place at the time it hit that
21 car, the car hit Mr. Jahm's car.

22 Now, in addition, there's another video that just
23 was recently supplied. And it is together with some
24 pictures, and I made copies, black and white copies.

25 THE COURT: Yeah. I think I saw them someplace.

1 MR. BRANSDORFER: Well, what they represent, and
2 our motion covers that, what they represent are what is
3 referenced to as an exemplar car, whatever that means;
4 exemplar vehicle.

5 THE COURT: Well, it looks like a car that took
6 some hits.

7 MR. BRANSDORFER: Well, it's a car --

8 THE COURT: It's apparently a LeSabre. I can see
9 that. That's what, a Buick?

10 MR NOLAND: A Buick, 1986, blue, two door.

11 THE COURT: Okay. And it looks like it's seen
12 better days.

13 MR. BRANSDORFER: Yeah. And it's represented to
14 be the car or typical -- an exemplar car, whatever that --

15 THE COURT: So it's not the plaintiff's car but
16 it's another car like plaintiff's car.

17 MR. BRANSDORFER: That's what they're saying.

18 THE COURT: Okay.

19 MR. BRANSDORFER: And they could have -- they
20 being the police department -- they had a photographer there
21 -- they could have done all of this at the time of the
22 collision.

23 There were pictures taken. They were produced on
24 discovery. There's -- here's the actual car, Your Honor. I
25 have pictures of it back then.

1 mirror that is up front; whether or not he hit -- whether he
2 hit to roof or whether he didn't hit anything.

3 And to use this car that purports to be the
4 identical model and with the identical shoulder harness,
5 identical -- whatever the other one had -- and --

6 THE COURT: Well, is the issue what equipment the
7 car had? I'm a little at loss as to what we're doing here.

8 MR. BRANSDORFER: Yeah. I am at a loss, too, as
9 to the exemplar car because --

10 THE COURT: I mean, if there was some question as
11 to what the plaintiff's car had in it and we know the exact
12 make and model, and we now have another one, we'd say,
13 "Well, it has this and that and --" for instance, shoulder
14 harnesses and I assume there's data available from General
15 Motors or somebody to tell us whether these make and model
16 cars had shoulder harnesses, if that's the issue. I'm not
17 sure I understand what the issue is.

18 MR. BRANSDORFER: Well, that's why I brought this
19 up, Your Honor. It apparently is an attempt by the defense
20 to use this person, Gary McDonald, to testify this is what
21 was his situation at the time of the collision and that,
22 when he was struck by the police car, he could not have hit
23 anything. That's what I think they're trying to say. And
24 that this is a reproduction of what the situation was at the
25 time.

1 And we're bringing it to the Court because we
2 think the videos, as I mentioned, do not either properly
3 have a foundation laid or can't have a foundation laid to
4 represent what -- what Mr. Jahm saw or heard at the time at
5 this intersection because the car -- the police car was
6 obviously in the intersection and moved in and struck him as
7 he was moving with the green light. And so, we think that
8 is not a proper reproduction of what Mr. Jahm saw.

9 And, as to the interior of the car, to have
10 somebody testify as to what he, Mr. Jahm, could have hit or
11 not hit when he's a little guy, and where his seat was in
12 terms of the driver's seat over towards the wheel or what
13 position back from the wheel where he was actually seated
14 cannot be reproduced because that simply isn't known.

15 He got struck and was confused; did the best he
16 can. And we just wanted to bring this before the Court's
17 attention so that there isn't any -- any misunderstanding as
18 to this exemplar car and Mr. McDonald's use of it through a
19 video, through his testimony, or through pictures saying
20 this is the precise way that it happened and he couldn't
21 have been injured period. That's why we brought this up.

22 THE COURT: Well, okay, I think. I suppose
23 probably the possibility of the plaintiff hitting this,
24 that, or the other thing would depend on a whole lot of
25 variables. In any event, go ahead, Mr. Noland. What can

1 you tell us about all these things?

2 MR NOLAND: I'll break it down into the two
3 categories, Your Honor.

4 The one having to do with police siren. It is
5 true that what we have is a video prepared by Gary McDonald
6 that shows the Walker police vehicle with lights activated
7 and siren as positioned in the municipal parking lot. It
8 drew the attention of all the workers around. "What's
9 happening? What's going on?"

10 THE COURT: Well, I suppose, if you put a car on
11 the lot and set off sirens and stuff, people are going to
12 think there's an air raid.

13 MR NOLAND: I don't think it's fair to say that
14 we, by any means, have tried to mislead anybody to suggest
15 that we're reconstructing the accident. I mean, I think we
16 might get into some problems if we position the car in the
17 intersection and we tried to place -- you know, if we were
18 suggesting to the jury that this is a recreation of the
19 accident, then the Court, you know, should be real concerned
20 about the details. And --

21 THE COURT: Well, yeah. I assume it's not an
22 accident reconstruction.

23 MR NOLAND: No. What -- what I think is
24 important, Your Honor, to consider, and Mr. Bransdorfer made
25 the point that, "Well, this police vehicle doesn't show what

1 car.

2 MR. BRANSDORFER: An exemplar car.

3 THE COURT: It would be quite remarkable if it
4 were the same car.

5 MR. BRANSDORFER: Well, if you look at the
6 pictures, it looks like it is from a salvage yard.

7 THE COURT: Well, it looks like it's seen better
8 days, I agree.

9 MR NOLAND: Not a lot of '86 LeSabre on the road.

10 MR. BRANSDORFER: Yeah, but this one is not the
11 one you're using -- want to use.

12 And further, this accident occurred -- collision
13 occurred in 1999. And my recollection is the car is a 1983?

14 MR NOLAND: '86.

15 MR. BRANSDORFER: '86. Thirteen years old at the
16 time. So now, three years old later, it's sixteen years
17 old, if I've got -- and all I'm saying is, Your Honor, that
18 the rules are, I think, the rules of evidence are quite
19 clear that, in order for this kind of testimony to be
20 admissible, there's got to be foundation that is laid -- and
21 we've cited authority -- that it's going to assist the jury
22 and not mislead the jury.

23 And that's why we brought this motion, and we just
24 don't think that this kind of testimony should be permitted
25 by the Court based on lack of foundation that I've tried to